UNPUBLISHED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

TERRY D. MUCKEY, Plaintiff, vs. JO ANNE B. BARNHART, COMMISSIONER OF SOCIAL SECURITY, Defendant.	No. C03-4061-MWB **REPORT AND RECOMMENDATION**

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I. INTRODUCTION

The plaintiff Terry D. Muckey ("Muckey") appeals a decision by an administrative law judge ("ALJ") denying Muckey's application for Title II disability insurance ("DI") benefits. Muckey claims the ALJ erred in finding he retains the residual functional capacity to perform his past relevant work, and in giving controlling weight to the opinions of DDS consultants who performed paper reviews of the record rather than to the opinions of doctors who actually examined Muckey. (*See* Doc. No. 7)

II. PROCEDURAL AND FACTUAL BACKGROUND

A. Procedural Background

On April 13, 2001, Muckey filed an application for DI benefits, alleging a disability onset date of June 10, 1999. (R. 46-48) Muckey alleged he was disabled due to pain in his lower back, right buttocks, and both legs, requiring him to use a cane to walk, and preventing him from standing, lifting, or sitting for extended periods of time. (R. 70) His application was denied initially on July 30, 2001 (R. 28, 30-33), and on reconsideration on December 9, 2001. (R. 29, 35-37) On January 2, 2002, Muckey requested a hearing (R. 39), and a hearing was held before ALJ Robert Maxwell on October 23, 2002, in Spencer, Iowa. (R. 263-315) Attorney David A. Scott represented Muckey at the hearing. Muckey, his wife Opal Muckey, and Vocational Expert ("VE") William V. Tucker, Ed.D., testified at the hearing.

On January 27, 2003, the ALJ ruled Muckey was not entitled to benefits. (R. 8-20) On May 5, 2003, the Appeals Council of the Social Security Administration denied

Muckey's request for review (R. 5-6), making the ALJ's decision the final decision of the Commissioner.

Muckey filed a timely Complaint in this court on July 3, 2003, seeking judicial review of the ALJ's ruling. (Doc. No. 1) In accordance with Administrative Order #1447, dated September 20, 1999, this matter was referred to the undersigned United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B), for the filing of a report and recommended disposition of Muckey's claim. Muckey filed a brief supporting his claim on November 10, 2003. (Doc. No. 7) The Commissioner filed a responsive brief on December 23, 2003. (Doc. No. 8). The matter is now fully submitted, and pursuant to 42 U.S.C. § 405(g), the court turns to a review of Muckey's claim for benefits.

B. Factual Background

1. Introductory facts and Muckey's testimony

Muckey was born in Spencer, Iowa, on January 21, 1955, making him forty-seven years old at the time of the hearing. He is married to Opal Muckey, and they make their home in Moneta, Iowa, which is about thirteen miles from Spencer. Muckey stated that although he has a driver's license, he has not driven since he started taking the medication Stadol, about a year-and-a-half prior to the hearing. (R. 267-68, 287) He drives a lawn mower, but never drives a car because he does not trust himself on the Stadol. (R. 287, 290) No doctor has told him not to drive. (R. 290)

Muckey finished the eleventh grade in school, and then joined the U.S. Army. He remained in the Army for three years, from August 24, 1972, to August 15, 1975. (R. 268) While in the Army, Muckey received training as a radio operator. He received an honorable discharge, and immediately after his discharge, he went to work for Spencer Foods as a butcher. He held the job until 1977, when the employees went on strike.

While the strike was in effect, Muckey moved from the area. He moved around and held several different jobs, and he earned a G.E.D. in 1987. (R. 268-70)

At some point, Muckey worked as a security guard. He testified the duties were much more physical than normal security duties. At night, he locked the gate and walked around the buildings' perimeter, but during the day, he assisted with whatever heavy work was going on. For example, he emptied ammonia tanks, climbed scaffolding, scooped snow, dug holes, and performed all kinds of general maintenance. Muckey stated he could still perform the duties that were purely related to security, such as watching the gate, but he could no longer perform the physical duties of the job. (R. 294-95)

Muckey finally returned to Iowa to work for Heartland Beef in about 1995, as "a quality control person." (R. 270-71, 296; *see* R. 58) He would "inspect the plant every morning and make sure everything was clean," and then he would "help with the day's production." (R. 296) He explained he would take boxes of meat weighing from thirty to forty pounds, put the meat in a large tub to marinate it, then remove the meat and re-box it, and stack the boxes on a pallet. He stated he lifted 4,000 pounds of meat every hour. (R. 296-97) Muckey stated he could not return to that job because he would be unable to perform the required lifting. (R. 297)

While he was working for Heartland Beef, he sustained an injury to his dominant right hand, requiring the removal of the muscle between his thumb and index finger on the right hand. (R. 271) When he tried to return to the job, he found he could not tolerate the cold on his hand. He also had carpal tunnel surgery on his right arm that, according to Muckey, "never healed up real good and it never felt good." (R. 272) Because of his intolerance for cold temperatures on his hand, and the pain from his hand and arm surgeries, he felt he was unable to return to work at Heartland. (*Id.*) At the hearing, he stated his hand no longer causes him much pain, and his hand no longer is bothered by

cold temperatures. (*Id.*) Muckey stated he also has had two surgeries on his left shoulder. (R. 272)

After he left Heartland Beef, Muckey did wood working at home for awhile. (R. 273) He noted that although he still has his wood working tools, he does little more than "tinkering around" because he does not trust himself with power tools while he is on pain medication. He will "whittle and stuff like that," but little else. (R. 292) He stated he would be unable to return to woodworking because it required him to lift heavy tree branches and stumps. (R. 298)

After working at home briefly, Muckey took a job with Midwest Mechanical. Except for the surgeries on his right hand and left shoulder, Muckey felt he was in generally good health when he started the job at Midwest Mechanical. (R. 273) While on that job, he was injured when he was descending an extension ladder. He stated the ladder "slipped a rung" as he was descending, causing him to step down hard on his right leg, which "just jarred the heck out of [his] back." (R. 273) He described having "instant pain" that worsened throughout the day and over time. After the back injury, he returned to work at Midwest Mechanical for about ten days, but he was in so much pain that he could hardly walk. (R. 273-74)

Muckey stated the only job he has had since leaving Midwest Mechanical has been a seasonal job during harvest, which he held at the time of the hearing. He was working eight hours a day at a grain elevator, "watching the elevator at night." (R. 274) He stated that once per hour, he would "walk out to the dryer and get . . . a half a coffee can of corn. Bring it back into the office, put it in a testing machine for testing moisture in it." (*Id.*) He expected the job to last three to four weeks, depending on the size of the corn crop. (R. 275)

Muckey gave the following summary of the different treatments doctors had given him for his back condition during the three years preceding the hearing:

> I'm not sure I'll be able to get the doctors' names correctly or in order. Right after I got hurt I started going [to] Dr. Zelzar [phonetic], a chiropractor that I had been going to for years. And thought maybe he'd be able to straighten me out. I did that for two weeks and then the company secretary said that that wasn't going to happen anymore. That I had to go see a professional doctor, an orthopedic doctor. So, I can't remember who she recommended. So, I went and did that. And they ordered a bunch of different tests for me and gave me epidurals and pain medicine. I've had physical therapy. I've had regular therapy where I lay down and get massaged. I've used a TENS unit, which is like a stimulating [device] you strap on your back. All kinds of medicine and that's pretty much what I've gone through. And they finally found some medicine that I can tolerate without getting sick.

(R. 276) He stated Dr. Pruitt had been his principal treating physician, and was the doctor who prescribed his medications. (*Id.*)

Muckey testified that other medications he tried before he began taking Stadol caused problems for him, including constipation, "getting really goofy," and "real bad headaches." (R. 277) He stated he was hospitalized for two days due to diverticulitis, which he thought might be related to one of the medications. (*Id.*) Muckey stated his stomach problems cleared up when he switched to the Stadol. He stated Stadol eases his pain but does not take it away completely. (R. 281) He explained Stadol is administered through a nasal spray that he uses three times per day, and sometimes an additional time at night if his pain is bad and he is not getting relief from sleeping pills and muscle relaxants. (R. 281-82) At one point, Muckey tried taking Ultram for about a week and discontinued the Stadol, but Ultram did not work for him. (R. 282)

Muckey stated he experiences side effects from Stadol including poor memory, light headaches, light-headedness, and difficulty seeing and concentration. (R. 282-83) He stated he is short-tempered, he sometimes feels very tired, and he sometimes laughs at nothing. Overall, he stated the Stadol "affects me crazy. I've never had anything like this in my life." (R. 283) He can read the newspaper, but does not remember much of what he has read. He used to be an avid reader, but stated he had not read a book for a long time. (R. 290) However, he noted that if he does not take the medication, his pain symptoms intensify. (R. 283) He also stated he does not sleep well, sleeping no more than four hours at a time. (R. 284) Muckey stated he has to stop frequently when he is walking because he will get tired and start hurting when he walks too far. He has less problems on a consistent surface, like grass or pavement, but when he steps on a small twig or pebble, it hurts him. He stated he usually walks around the block once a day, which takes him an average of twenty minutes. (R. 285-86) He opined he can stand for as long as ten minutes at a time before the pain requires him to sit down. (R. 286)

Despite taking the medication, Muckey stated he always has some degree of pain. (R. 283-84) At the time of the hearing, he reported the pain was preventing him from sitting in one position for very long. He stated the pain was "just off to the spine and feels like it's on the top of my butt on the right side. And my right thigh is just screaming right now." (R. 284) He noted the pain is always worse on the right side than on the left, but he does get pain on the left every once in awhile. (*Id.*) He stated he was in pain after sitting for about thirty minutes during the hearing. (R. 286)

Muckey saw several doctors in connection with his worker's compensation claim. His attorney sent him to see a doctor, and his employer sent him to another doctor. According to Muckey, one of the doctors, Dr. Carlson in Sioux Falls, South Dakota, recommended back surgery at two or three different levels of Muckey's spine. The

worker's compensation carrier did not agree and sent him to see William R. Boulden, M.D., who stated surgery was not indicated at that time. (R. 279-81) Specifically, Dr. Boulden opined surgery "would probably be a very poor choice" for three reasons: (1) Muckey is a smoker, lessening the surgical success rate; (2) performing surgery on two or three levels "would have a high failure rate" and not produce the desired outcome; and (3) he opined Muckey had "a chronic pain problem." (R. 280) Doctors at the V.A. agreed with the assessment that surgery would not help him. (R. 291)

Muckey's attorney asked about his relationship with Dr. Hoversten, who found Muckey's subjective complaints not to be credible. (*See* R. 287) Muckey stated:

> The first time I met him he came in the office, introduced himself and said there's a lot of discrepancy between what I'm doing and what I'm saying and what is – what he's read. And that was pretty much the end of that discussion. He had me lay on the table. He had me do some leg lifts. He tested my knee and my ankle for reflexes and I was in and out of there in five minutes. And I don't remember if that was the second time or the first time but I haven't seen that man over 10 minutes between both times I saw him.

(*Id.*) Muckey learned at his worker's compensation hearing that Dr. Hoversten had been basing a lot of his opinions on a videotape the doctor had seen of Muckey's brother. Muckey opined that because of the tape, Dr. Hoversten thought Muckey was lying. (R. 287-88)

Muckey stated no doctor has recommended further therapy for him. (R. 288) He stated he expects to be on pain medication for the rest of his life. (R. 289) He has not had any kind of treatment or evaluations for his hands or shoulders since June 1999, since his back injury became his primary concern. (R. 292) He thought a doctor had given him some restrictions on using his hands and shoulders, but he could not remember what they

were, and he indicated it is his back injury that primarily keeps him from being able to work. (R. 292-93) He stated Dr. Pruitt thought he should be able to do some type of work, but the doctor had never suggested what type of work it might be. (R. 294) Muckey thought if he could find a job with similar physical requirements to his temporary job at the grain elevator, he would be able to perform the job full time on an ongoing basis. (*Id.*)

Muckey testified he is 5'11" tall and weighs 245 pounds. He noted he has gained fifty pounds since he got hurt, due to inactivity. (R. 291) He stated no doctor has indicated his weight may be affecting his back problems, although Dr. Carlson said he should lose some weight and quit smoking if he were going to have surgery. (R. 298) Similarly, Dr. Boulden opined that Muckey's weight and the fact that he smokes would make him a poor surgical candidate. (R. 299) Muckey indicated he smokes at least a pack-and-a-half a day. (R. 291-92) Dr. Pruitt said he would go ahead and do the surgery, but he opined Muckey would "be right back in here in a year." (R. 299)

Muckey arrived at the hearing using a cane, which he stated is necessary to keep his right leg from buckling on him. He stated, "I got tired of falling down. I don't need to get hurt anymore." (R. 293) Muckey started using the cane after his second or third epidural, in about September 1999. He indicated he began falling down after the last epidural. Muckey got the cane on his own, and then talked to Dr. Pruitt about it. According to Muckey, Dr. Pruitt "said that's probably a good deal," and the doctor then wrote out a prescription for the cane. (*Id.*)

Muckey stated he settled his worker's compensation claim for $43,000 gross, before he paid his attorney and the doctors. Under the terms of the settlement, the worker's compensation carrier has no further treatment responsibilities. (R. 299-300) He stated his

current sources of income were his temporary job at the grain elevator, and his wife's Social Security benefits. (R. 300)

2. Opal Muckey's testimony

Opal Muckey ("Opal") was asked to describe how Muckey's disposition is affected by his pain. She stated Muckey is very moody, and his medication makes him short-tempered. (R. 300-01) According to Opal, she has to repeat herself because Muckey is unable to remember things even shortly after they talk about them. (R. 301) She opined the medication keeps him from thinking clearly, stating, for example, "he's been an avid reader and he's a very smart man in his mind and he always thinks things through before but now he doesn't think as clearly . . . [b]ecause he doesn't have the temperament to concentrate that long." (R. 302) Opal opined Muckey could walk for short intervals, but could do no more than that. (R. 304)

Opal stated Muckey had been diagnosed with hepatitis C about six months prior to the hearing, when he went in for a checkup at the V.A. hospital. She stated he was directed to obtain blood tests every four to six months, and take a round of hepatitis and hepatitis B shots. (R. 302-03) She stated the V.A. had known about the hepatitis C diagnosis for a year, but had not informed Muckey for several months. (R. 302) Opal stated she and Muckey had determined he probably contracted the disease when he got a tattoo in 1992. She noted he was not being treated for the disease other than the periodic blood tests. (R. 303)

According to Opal, when Muckey began feeling sick from symptoms that led to his hepatitis C diagnosis, "he felt like he wanted to blow up from the stomach and he couldn't go to the bathroom at all. And he was in such pain and sweaty and feverish . . . [h]e wasn't able to do anything. He couldn't get out of bed either." (R. 304) This lasted for

about "a day and then after that he was back to normal." (*Id.*) After this happened a second time, the doctor put Muckey on Stadol. (*Id.*)

Opal stated Muckey used to drink alcohol, but he quit drinking in about 2000. (R. 304-05)

The ALJ noted the records from the V.A. do not contain a diagnosis of hepatitis C. He pointed to a visit in July 2001, where the diagnoses shown are "lumbar disk disease, chronic nasal congestion, history of diverticulitis, history of alcoholism, ongoing smoking, history of chronic white blood count and liver enzyme elevation and obesity." (R. 306) Muckey interjected, "The liver is what tipped them off about maybe me having Hepatitis C." (*Id.*) The ALJ responded, "Well, I'm glad you can make that diagnosis. I don't see that. And I'm not trying to be facetious here." (*Id.*)

Opal stated, "Dr. Creswell has record of [Muckey's] Hepatitis C because he's the one that's been treating [Muckey] for the liver checkup and stuff. His last shot." (*Id.*) The ALJ left the record open for the receipt of additional medical records Muckey might want to submit to support his contention that he has been diagnosed with hepatitis C. (R. 307)

3. Muckey's medical history[1]

On February 12, 1999, Muckey was seen by Kenneth R. Hunziker, M.D. for a pre-employment physical examination. He gave a history of two shoulder surgeries, right carpal tunnel surgery, and two surgeries on his right hand following a crush injury. Muckey reported smoking one pack of cigarettes daily, and stated he drank "a case of

[1]The record contains medical history that is not relevant to Muckey's disability claim. For example, medical records indicate Muckey has a history of sinus problems. For purposes of this Report and Recommendation, the court will discuss only the history that relates directly to Muckey's disability claim.

alcohol every two weeks." (R. 195) Muckey was noted to be moderately overweight at 248 pounds, and to have poor dentition and "a lot of gum disease." (*Id.*) Otherwise, his physical examination was normal, and Dr. Hunziker noted, "No contra-indications to employment." (*Id.*)

On approximately June 10, 1999, Muckey injured his back at work. Muckey saw Larry J. Barthel, M.D. on July 20, 1999, and gave the following history of the injury:

> He was up on an extension ladder. As he was starting to come down the extension slipped about five or six inches, catching on the rung and causing him to jar his back. He felt immediate low back discomfort then, but was able to continue working. On the following day the pain started to increase in intensity and he started developing pain in his right buttock with radiation down the anterior thigh to his anterior ankle. He has continued to have pain primarily on the right side of his back with pain radiating down the right leg since then. He has been receiving chiropractic treatments twice a day, but has not been feeling any improvement. He is referred here for evaluation. He has been on no medication. He denies any prior history of serious back injury or disk problems. He has had occasional back strain before but nothing requiring extensive therapy, surgery or time off work. He denies any bladder or bowel disturbance. It has been difficult for him to find a comfortable position in which to rest, but lying down seems to improve his symptoms.

(R. 194) Dr. Barthel diagnosed Muckey with "[r]ight lower back pain with right lumbar radiculopathy at L-3 and L-4 likely related to his original injury." (*Id.*) He prescribed Vioxx, and physical therapy consisting of low back stretching exercises. He noted Muckey "may be a candidate for early surgical intervention," or "for initial trial of Epidural injection." (*Id.*) Lumbar spine X-rays showed no obvious abnormalities, and Dr. Barthel

scheduled Muckey for an MRI. He gave Muckey a work release and told him to return for follow-up in one week. (*Id.*)

Muckey attended several physical therapy sessions and received training in exercises for his back. After the MRI results were reviewed, Dr. Barthel scheduled Muckey for an epidural flood, which he had on July 27, 2999. His wife called the doctor the following day to ask what Muckey could take for pain, and Dr. Barthel advised him to take Vioxx and Tylenol. (R. 193) Muckey saw the doctor on July 30, 1999, for follow-up. He reported that his back felt somewhat better after the epidural flood, and the pain in his right leg was somewhat decreased. He still complained of considerable pain in his right buttock area and numbness around his right knee. He stated he had been doing back stretching exercises at home. The doctor instructed him in some additional back stretching exercises and prescribed Tylenol #3 and Vioxx. He noted Muckey was scheduled to see Dr. Pruitt, a "spine surgeon," the next week. Dr. Barthel noted if Muckey failed to show "fairly rapid improvement, he would be a surgical candidate." (R. 192) He scheduled a follow-up appointment in two weeks. (*Id.*)

Muckey saw Alexander Pruitt, M.D. on August 2, 1999, with complaints of "pain going down his leg to the top of his foot on the right and just down the posterior aspect of his leg and in the lateral aspect of his calf on the left." (R. 246) Other than these complaints, his physical examination showed no tension signs or other findings. The doctor noted Muckey's MRI showed "bulging dried out disc's at 4/5 and 5/1." (*Id.*) Dr. Pruitt prescribed a Medrol Dosepak, and noted that if Muckey did not respond "very nicely," he would recommend a single nerve root injection on the right at L-5. He gave Muckey a work release until his next appointment, and scheduled a follow-up in two weeks. (*Id.*)

At Muckey's follow-up appointment on August 23, 1999, Dr. Pruitt noted they had tried a Medrol Dosepak, TENS unit, and pain pills including Talwin #3, none of which had provided Muckey with any significant relief. The doctor prescribed Talwin NX, and a single nerve root injection at L-5 on the right. He noted a similar injection might be indicated at L-4 "to differentiate which one is causing him pain." (R. 245) He scheduled a follow-up in one week. (*Id.*)

When Muckey went to the hospital on August 24, 1999, to have the single nerve root injection as ordered by Dr. Pruitt, "[t]here was confusion over at the hospital and he inadvertently got an epidural steroid." (R. 244) Dr. Pruitt assured Muckey the only concern was the delay that resulted in getting him the single nerve root injection. Muckey expressed a desire not to return to the Spencer hospital, and on August 25, 1999, Dr. Pruitt scheduled him to see Dr. Samuelson in Sioux City. However, on August 30, 1999, Muckey called Dr. Pruitt's office and expressed reservations about having the nerve root injection. He was advised to call the doctor's office when he wanted the injection. Because Talwin apparently was giving Muckey nightmares, the doctor switched him to Lorcet. (*Id.*) Lorcet caused him some itching, so he was started on over-the-counter Benadryl. (R. 243)

Muckey later decided to have the nerve root injection, and he underwent the procedure on September 8, 1999. (*Id.*; R. 136) He reported to Dr. Pruitt that his leg had gone numb from the injection but he was still having pain. Because the injection did not give Muckey relief of his symptoms, Dr. Pruitt opined it was not L-5 on the right that was causing his pain. He scheduled a single nerve root injection at L-4 on the right, and renewed Muckey's prescription for Lorcet. (R. 243)

There apparently was some confusion over the area to be injected, and Muckey received an injection at a different level than Dr. Pruitt had intended. Dr. Pruitt observed

that some discrepancy exists based on whether one is counting from the top of the lumbar spine or from the bottom. The doctor's notes indicate the radiologist "may have done the [injection at] the S-1 and L-5 as opposed to the L-5 and L-4." (R. 242) He scheduled another injection to be sure the correct area had been treated. (*Id.*)

On October 7, 1999, Muckey was seen by David L. Hoversten, M.D. for an independent medical examination on behalf of Muckey's employer. Dr. Hoversten noted Muckey had been off work since the date of his injury. Muckey described a deep ache in his right anterior groin, "with pins-and-needles in the right calf and numbness and pins-and-needles of both feet. He has a stabbing sensation across the lumbosacral junction in the back, with a deep ache in the right buttock, and a little bit of stabbing sensation of the left calf." (R. 172) Dr. Hoversten observed the following, *inter alia*, during his physical examination of Muckey:

> In having him walk, he walks in an uncoordinated, uncharacteristic fashion with a limp on the right leg which makes no sense physiologically or anatomically to me. Secondly, when he walks on his tiptoes, it is in a very uncoordinated, herky-jerky fashion. Again, it would not be the type I would expect to see with anyone who has sciatica or low back pain, but appears to be more of a put-on type of abnormal limp. Similarly, with walking on his heels, it is a very herky-jerky, uncoordinated, peculiar gait, which does not appear to be based upon any consistent anatomic problem, but more or less on a desire to impress the observer with the severity of his disability. When asked to bend down and touch his toes, the patient slowly got down to his hands just about to his toes themselves. He began to lose his balance and fall backward a little bit and quickly caught himself in a normal fashion. In the sitting position, reflexes are normal in both knees and both ankles. Straight leg raising is pretty much negative, except for hamstring tightness to 70 to 80 degrees on the left, and it is perhaps slightly positive on the right at about

> 80 degrees. Hip motion is otherwise free and supple. In the prone position, he has slightly increased sciatic irritation in the right sciatic notch, and there is moderate increase of tenderness to direct pressure over L4-5 and L5-S1. Reverse straight leg raising is negative. He tends to have a lot of squirming and moving around on the table during the exam.

(R. 171)

Dr. Hoversten's impression was "[d]egenerative disk disease with low back discomfort and symptom complaints and disability in marked excess to what one would expect from objective and physical evaluation. (*Id.*) The doctor recommended a two-month back rehab program, followed by a Blankenship functional capacity assessment test to use as a basis for return to work in a diminished capacity. (R. 170) In addition, Dr. Hoversten noted he had viewed a video surveillance tape taken by an insurance adjuster. He stated the video "showed [Muckey] working in his yard, riding a lawn mower, picking up sticks, and generally cleaning up the yard. During that time his gait was normal, his ability to pick up sticks was normal, he was able to stoop and bend and lift boards, etc., all in an apparently normal fashion, which was clearly very different from his appearance today at the exam." (*Id.*)[2]

Muckey returned to see Dr. Pruitt for follow-up on October 15, 1999. He reported little improvement, trouble sleeping, a lot of discomfort in his back, and problems walking. Dr. Pruitt prescribed Flexeril, Vioxx, and Pamelor, and noted Muckey was scheduled to begin a back care rehab program. Dr. Pruitt also noted Muckey had gotten "a second opinion from the guys in Sioux Falls." (R. 241) When Muckey saw Dr. Pruitt again on October 29, 1999, he was still in the back care rehab program and was increasing

[2]Muckey testified the videotape actually was of his brother, rather than him. (*See* R. 287-88)

in strength. However, he reported having a lot of discomfort and trouble sleeping. The doctor increased his Pamelor dosage, and switched him from Vioxx to Arthrotec. (*Id.*)

Muckey returned for follow-up on November 16, 1999. Dr. Pruitt noted Muckey had "basically plateaued" in his back care rehab program and had not improved much since his last appointment. Dr. Pruitt observed Muckey had been receiving treatment for his back for over four months by that time, and the doctor indicated he would "try a functional capacity evaluation ["FCE"] on him and give him his permanent restrictions." (R. 240) Dr. Pruitt prescribed Darvocet N–100 for pain, noting Hydrocodone made Muckey too light-headed. He also prescribed Ambien to see if it would help Muckey sleep, noting if Muckey could not tolerate the Ambien, then they would try a higher dosage of Nortriptyline. (*Id.*) Dr. Pruitt referred Muckey to the Occupational Rehab Center for the FCE. (*See* R. 137)

Muckey had the FCE on November 30, 1999. (R. 137-68) He was evaluated for almost four hours, and "was pleasant throughout the evaluation." (R. 137) Barbara Peters, the occupational therapist who performed Muckey's FCE, noted, *inter alia*, the following:

> The actual FCE results indicate that Mr. Muckey is able to work at the SEDENTARY Physical Demand Level for an 8 hour day; however, there were indications of submaximal effort. Therefore, this represents [h]is minimal functional ability.
>
> I estimate that he should be able to work at the MEDIUM Physical Demand Level and I have enclosed a Functional Capacity Evaluation form reflecting this, labeled "Estimated Functional Capacities".
>
> The [Functional Strength Deficit] calculation indicates that Mr. Muckey has a 0% Functional Strength Deficit, an Insignificant Deficit. This indicates that the injured area is

> functioning as well as the non-injured areas. The results of his Static Strength Tests are classified as Invalid.

(*Id.*)

Ms. Peters noted testing suggested "a non organic component to [Muckey's] pain, medical impairment and disability," and she noted he "exhibited overt symptom/disability exaggeration behavior by [their] criteria[.]" (R. 138) She noted the testing indicated "a conscious effort to demonstrate a greater level of pain and disability than are actually present," and she suggested that "conscious malingering should be considered as one of the motivations for this behavioral profile." (*Id.*) As examples, Ms. Peters noted the following:

> His movement patterns improved significantly with distraction. He fell to the floor several times during the FCE. However, when falling he utilized full control of his movement patterns. He was not able to extend back during the inclinometry test. However, he demonstrated back extension several times without any indication of true pain. He was not able to Squat without falling during direct observation, but Squatted several times during distraction smoothly, utilizing normal movement patterns and lacking a true pain response. Rating Mr. Muckey at the MEDIUM PDC level is based on the results of the Aculift evaluation which does not show any signs of true pain or overload.

(*Id.*; *see* R. 140-68)

Muckey returned to see Dr. Pruitt on December 7, 1999, with the results of his FCE. Dr. Pruitt noted Muckey could return to work "with minimal ability to do certain things." (R. 239) The doctor opined Muckey still needed a crutch to get around, and noted Muckey would only be able to use his nondominant left hand at work because he carried the crutch in his right hand. Per the FCE, Dr. Pruitt stated Muckey could carry up to ten pounds frequently, and thirty pounds occasionally; alternate sitting and standing

as necessary; only work with his left hand and use the crutch for stability; and only work four hours per day to start. He scheduled a follow-up exam in six weeks. The doctor switched Muckey from Darvocet to Ultram, and also prescribed Flexeril and increased the Ambien dosage. He noted the Darvocet and Ultram could be sedating so Muckey should avoid contact with any dangerous machinery. (*Id.*)

At his next follow-up visit on January 18, 2000, Muckey reported he was still having pain going down both legs. Dr. Pruitt ordered a repeat MRI, and renewed the prescriptions for Ultram and Ambien. He noted that if the MRI came back normal, he might have to consider that Muckey had reached maximum medical improvement. (R. 238)

Muckey returned to see Dr. Pruitt on January 31, 2000, after his repeat MRI. Dr. Pruitt noted no change from the MRI in July 1999, either objectively or symptomatically. The MRI still evidenced degenerative discs at 4/5 and 5/1. Dr. Pruitt stated Muckey had reached maximum medical improvement and could "go back to doing as much as he can." (*Id.*) He noted Muckey and his employer would have to "work out what they want to do." (*Id.*) He refilled the Ultram and Ambien prescriptions, and advised Muckey to return to see him as needed. (*Id.*)

On February 15, 2000, Muckey saw Dr. Hoversten again for a permanent impairment evaluation. Dr. Hoversten found the invalid FCE to be an inappropriate basis for a recommendation that Muckey be restricted to light duty. (R. 169) Dr. Hoversten's diagnosis was "severe degenerative disc disease with very slight stenosis at L4-5." (*Id.*) He assessed a permanent impairment rating of 5% impairment of the whole person. He found that "2% of his 5% impairment is due to the work injury and present employment area and that 3% of the degenerative problem was a preexisting condition which should not

be work compensable." (*Id.*) He opined Muckey "would be capable of doing medium-capacity work." (*Id.*)

Muckey was admitted into the hospital on February 16, 2000, with severe abdominal pain, some vomiting, and bowel problems. He was diagnosed with diverticulitis, and treated with Unasyn. He was released with instructions for a "weight loss diverticula diet"; prescriptions for Darvocet-N, Flagyl, and Augmentin; and instructions not to consume alcohol while taking the Flagyl. (R. 173-75; 189-90)

On March 28, 2000, Muckey underwent an independent medical examination by Keith W. Riggins, M.D. Dr. Riggins noted the report from Muckey's July 21, 1999, MRI indicated "the presence of a moderate diffuse posterior disc bulge at the L4-5 level which is described as extending into both neural foramina and deviating the L4 nerve roots bilaterally." (R. 184) However, Dr. Riggins noted the report did not indicate visualization of any nerve root impingement. He found those two statements to be inconsistent "in that deviation of a nerve root by a disc reflects nerve root impingement." (*Id.*) He further noted, "Similar statements are present regarding the L5-S1 level." (*Id.*) Dr. Riggins observed that the report from Muckey's FCE indicated the study was invalid. He opined "that any functional classification based upon an invalid study is also invalid." (R. 183)

In his own examination of Muckey, Dr. Riggins noted, "Range of motion measurements are inconsistent and invalid." (R. 182) Further testing indicated Muckey "has a symptom complex extending beyond that which would normally be expected to be produced by intervertebral disc disease alone." (*Id.*) Dr. Riggins suspected the presence of "some degree of segmental instability" could be producing some of Muckey's symptoms. (*Id.*) He requested the opportunity to review Muckey's earlier X-ray and MRI studies, and he recommended an EMG of Muckey's right lower extremity. (R. 181)

Dr. Riggins concluded Muckey was "not considered to be at maximum medical improvement." (*Id.*)

On May 22, 2000, Dr. Riggins reported he had reviewed Muckey's X-rays from July 20, 1999, and the two MRIs of his back. He found the lumbar spine X-rays to be incomplete and inconclusive, and recommended Muckey "undergo side-lying lateral flexion and extension views of the lumbar spine and a standing lateral of the L5-6 level in order to determine whether or not segmental instability is present." (R. 179) Muckey apparently underwent those X-ray studies on June 28, 2000 (*see* R. 177). Dr. Riggins reviewed the films and found and relationship of the L4-5 vertebra to the L3-4 vertebra did not satisfy the criteria for a diagnosis of segmental instability. However, he also noted that a "5 mm. posterior translation of the fourth lumbar vertebra with respect to the fifth lumbar vertebra is present on the extension views," and he concluded, "[t]his degree of motion satisfies criteria for the diagnosis of segmental instability." (*Id.*)

Muckey saw Dr. Pruitt again on September 1, 2000, for a medication review. His medications were continued with dosages unchanged. Dr. Pruitt noted he had no other treatment options to offer Muckey. He suggested Muckey increase his activity as tolerated, and return for follow-up in six months. (R. 237)

Muckey underwent an EMG examination of his lower extremities as recommended by Dr. Riggins. Dr. Riggins reviewed the report on September 18, 2000, and noted it "indicates no evidence of radiculopathy is present." (R. 176) His diagnosis, therefore, was "Segmental instability lumbar spine, L4-5 level." He rated Muckey as having a "20% impairment of the whole person due to impairment in function of the lumbar spine." (*Id.*)

When Muckey returned to see Dr. Pruitt on March 5, 2001, he reported his condition had not improved. Dr. Pruitt recommended an evaluation by Drs. Lockwood and Carlson to see what they might recommend. He opined Muckey was not a good

surgical candidate, and suggested a nerve stimulator might be beneficial. He switched Muckey from Ultram to Mobic, because Muckey reported low dose Ultram was not working and if he took a higher dose, it made him "goofy." (R. 236) Dr. Pruitt noted if the Mobic did not work, they would try Stadol nasal spray. (*Id.*) They apparently tried the Stadol immediately thereafter, because on March 9, 2001, the doctor's notes indicate, "It sounds like the Stadol nasal spray is working for him." (R. 235) Similarly, on March 26, 2001, a note from the Mercy Family Clinic indicates Muckey was using the Stadol nasal spray for his chronic low back pain with "pretty good results." (R. 186)

Muckey saw Walter O. Carlson, M.D. on March 19, 2001, on referral from Dr. Pruitt. Dr. Carlson ordered a repeat MRI of Muckey's lumbar spine, and a discogram of the lumbar area, both of which were performed on May 23, 2001. Following the procedures, Muckey returned to see Dr. Carlson, who noted the discogram was normal at L3-4. He also noted Muckey "does have severe degenerative disease at 4-5 and 5-1." (R. 217) Dr. Carlson recommended "a front and back procedure [a sacrum fusion, *see* R. 215] with cages and unilateral instrumentation posterior." (*Id.*) He noted Muckey was in agreement, and they planned to schedule the procedure. (*Id.*) As of July 12, 2001, Muckey was still awaiting approval of the procedure by the insurance company. (*Id.*)

Muckey saw Dr. Pruitt for follow-up on July 23, 2001. Dr. Pruitt noted Dr. Carlson had recommended "a 4 to 1 fusion, front to back." (R. 233) He noted Muckey was still smoking but had quit drinking and was losing a little weight. Dr. Pruitt expressed some concern that Muckey had been taking Vicodin, "which is pretty addictive." (*Id.*) Muckey told the doctor "he got less high" on Stadol. (*Id.*) Dr. Pruitt indicated he thought the surgical option would be beneficial, and he thought Muckey's expectations from the surgery (*i.e.*, that it might not relieve all of his pain) were realistic. (*Id.*)

On July 30, 2001, J.D. Wilson, M.D. reviewed Muckey's medical records and completed a Physical Residual Functional Capacity Assessment. (R. 115-22) He found Muckey could lift fifty pounds occasionally and twenty-five pounds frequently; stand and/or walk, with normal breaks, for six hours in an eight-hour workday; sit for six hours in an eight-hour workday; and push or pull without limitation. He found Muckey had no postural, manipulative, visual, communicative, or environmental limitations. In his comments, Dr. Wilson noted the record contained "overwhelming evidence" that Muckey was magnifying his symptoms. (R. 123) He noted, "Multiple medical professionals have observed and commented on [Muckey's] apparent desire to portray himself more limited than he is." (*Id.*) He therefore found Muckey's subjective complaints not to be credible, and opined Muckey was not "nearly as limited as he states." (*Id.*) He further opined Muckey did not to need to use a cane. (*Id.*) However, Dr. Wilson also noted the discogram "showed L3-4 posterior annular tear and a moderate amount of narrowing of the L5-S1 disc," and he noted Muckey was awaiting approval from his insurance company for surgery. (*Id.*)

On November 21, 2001, Muckey was evaluated by Brian J. Dvorak, M.D. at the request of Disability Determination Services. (R. 247-50) The doctor noted the following regarding Muckey's activities of daily living:

> Mr. Muckey experiences early and middle insomnia. He has no difficulty performing hygienic measures, and he can dress himself. Mr. Muckey can fold clothes, dust furniture while holding [onto] other objects, walk around the block and perform upper extremity strengthening exercises with a Theraband 3 times daily. He periodically goes to Wal-Mart where he walks for 20 to 30 minutes with his cane. He also rides a stationary bike 3 to 4 times per day, 3 to 4 minutes per session. Forty to 75% of the time each day, however, he reclines in a chair or lays down in his bed.

> Because of his low back discomfort, he can no longer pursue previous hobbies such as hunting and horse back riding. He occasionally rides a mower, but he can only do this for approximately 5 minutes before his back pain curtails the activity.
>
> He avoids all strenuous activities such as heavy lifting, repetitive low back bending and running.

(R. 248)

After conducting a thorough examination, Dr. Dvorak reached the following diagnoses:

> 1.) Chronic low back discomfort with bilateral lower extremity radicular symptoms. Previous MRI's revealed degenerative disk disease without significant nerve root impingement.
> 2.) Probable pain disorder. The examinee manifests magnified pain behaviors, reports symptoms which seem out of proportion to the objective findings noted during this and previous evaluations, and pain became the primary focus of his life. He is now dependent on Stadol, and pain impacts almost all of his activities of daily living.
> 3.) Nonorganic physical exam findings. These include positive Waddell signs and inconsistent findings during the evaluation of lower extremity strength.
> 4.) Cigarette abuse.

(R. 250) Dr. Dvorak noted it was unlikely Muckey's symptoms would improve further with additional treatment modalities. He observed that Muckey likely has a pain disorder, and his low back discomfort is "static and permanent." (R. 250)

Dr. Dvorak opined Muckey likely would be unable to tolerate repetitive stooping, climbing, kneeling, or crawling, but he had no difficulty "handling light objects, seeing, hearing or speaking." (*Id.*) He noted Muckey reported difficulty standing more than ten minutes, sitting more than five to ten minutes, or walking further than a few city blocks. (*Id.*)

On December 18, 2001, Gary G. Cromer, M.D. apparently reviewed Dr. Wilson's assessment, and concurred in his conclusions.[3] Dr. Cromer found Muckey to have "documented medically determinable impairments with degenerative disc disease with possible radiculopathy." (R. 132) Although he found the impairment to be severe, he further found it did not meet or equal any of the Listings. He noted the inconsistencies in Muckey's subjective reports and objective test results "severely eroded the credibility of [Muckey's] subjective allegations." (*Id.*) Dr. Cromer discounted Dr. Dvorak's conclusions because he found them to be based largely on Muckey's subjective complaints. (*Id.*)

On February 6, 2002, Muckey saw William R. Boulden, M.D. for an evaluation. (R. 251-55) Dr. Boulden reviewed Muckey's previous medical records and expressed concern that he had "not been adequately worked up to even consider surgical intervention." (R. 254) He disagreed with the interpretation of Muckey's discograms as normal, noting they showed "a lateral herniated disc at L3/4 to the right." (*Id.*) He further noted, "L4/5 is definitely abnormal," and he opined an L5/S1 discogram also would be abnormal, although one was not done at that level. (*Id.*)

Dr. Boulden believed Muckey to be a poor surgical candidate, for four reasons: (1) the surgical success rate for a chronic smoker is very poor; (2) surgery at several levels would have a high failure rate, and Muckey likely would not have a good outcome; (3) he has a chronic pain problem, and his MMPI results indicate he would not be a good surgical candidate; and (4) he has a drug dependency on Stadol. (*Id.*)

Dr. Boulden opined Muckey's ongoing chronic low back pain was still related to his work injury of June 1999. (*Id.*) Rather than surgery, Dr. Boulden recommended "a

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[3]The Physical Residual Functional Capacity Assessment submitted with Dr. Cromer's review comments is for a Shawn P. Budak, and not for Muckey. (*See* R. 124-32)

more conservative, but aggressive approach" that would include quitting smoking, getting off pain medications, getting into "a true back rehabilitation program that would include the German stabilization program" (he noted Muckey's prior back rehab program was insufficient), and getting into a work hardening program. With these measures, he believed Muckey would be able to return to work, although not heavy, physical, manual work. (R. 255)

On March 6, 2002, Muckey was evaluated due to a positive hepatitis C finding from laboratory testing in January 2002. Blood was drawn for testing, with a recommendation that if his liver function tests came back with elevated levels, he should have hepatitis C genotyping and viral load testing, with the possibility of a liver biopsy and Interferon treatment. (R. 259-62) There is no indication in the record that any treatment was undertaken for hepatitis C.

Muckey saw Dr. Pruitt again on September 30, 2002, reporting "a lot of problems with Stadol." (R. 256) Dr. Pruitt took him off the Stadol and prescribed Ultram, noting if the Ultram was not effective, they would try Bextra, and if that proved ineffective, they would put him back on Stadol. (*Id.*)

4. Vocational expert's testimony

VE Tucker noted none of the skills acquired by Muckey in his past work would be transferable to other semi-skilled jobs, or to skilled but less physical jobs, either light or sedentary in nature. (R. 310) The ALJ then asked the VE the following hypothetical question:

> Assume with me you're dealing with an individual of younger age and that they're under 50. High school equivalency education. Semi-skilled or skilled work history without transferable skills as you've testified to. I want you to assume

> a person with medically determinable impairments that result in the same work related limitations described by Mr. Muckey in his testimony here today. Crediting that testimony would a person be able to do any of the past jobs?

(*Id.*) The VE responded as follows:

> I think he indicated during his testimony that he could do the work of a security guard if it didn't have the other ancillary kinds of activities that he had performed in the past. But if it was strictly security guard work I think he indicated that he could do that. However, at another point in his testimony he indicated that he was limited to standing to periods of about 10 minutes and sitting for periods of about 20 to 30 minutes. So, I see a little discrepancy there but he did indicate that he thought he could do the work of a security guard.

(*Id.*)

The VE noted that if Muckey could work as a security guard, he also could work as an assembler of small products, which would allow alternating between sitting and standing; as an inspector and hand packager; and as a laundry folder. (R. 311)

The ALJ asked the VE a second hypothetical question, as follows:

> Hypothetical two is intend[ed] to ask you about the state agency assessment. Vocational factors would be the same as in question one. This time what if an individual could occasionally lift or carry 20 pounds, frequently 10 pounds. Stand, walk or sit in each category with normal breaks about six hours in an eight-hour workday. Push, pull's unlimited. Postural activities are all occasional, which would rule out frequently. No manipulative, visual, communicative or environmental limits. This is light work is it not? . . . If a person could perform work activities as the state agency found could they do any of [Muckey's] past jobs?

(R. 311-12) The VE agreed the description contemplated light work, and found the hypothetical claimant could do the security guard job (as the job is defined, not as Muckey

performed it with the extra duties), as well as the jobs listed in response to the first hypothetical. (R. 312)

5. The ALJ's decision

The ALJ found Muckey was insured for disability insurance purposes through June 30, 2002, and he had not engaged in substantial activity since his alleged onset date of June 10, 1999. (R. 19, ¶¶ 1 & 2) The ALJ found Muckey's degenerative disc disease with radiculopathy constituted a severe, medically-determinable impairment that did not meet or medically equal any listed impairment. (R. 19-20, ¶¶ 3 & 4)

The ALJ found Muckey's subjective allegations regarding his limitations not to be wholly credible. (R. 20, ¶ 5) In support of this finding, the ALJ stated Muckey's "subjective allegations regarding the severity of his symptoms and their restrictions on his ability to work [are] not proportional to his actual functioning level," noting he "is independent in his daily living activities and social functioning." (R. 15) The ALJ found Muckey's subjective allegations to be inconsistent with his hearing testimony, clinical findings, and other evidence in the record. (*Id.*) For example, the ALJ noted the FCE evaluator opined Muckey could be malingering, given his exaggerated symptom and disability behavior. (R. 16) The ALJ also noted other discrepancies between the objective clinical evidence and Muckey's subjective limitations. (R. 15-17) Further, the ALJ noted Muckey himself testified he believed he was "capable of performing basic work activities on a regular and continuing basis." (R. 14)

The ALJ concluded that although the medical evidence contained signs and laboratory findings that show the existence of a medically-determinable impairment that could produce Muckey's symptoms and pain, his "impairments and symptoms do not limit [his] basic work activities to the extent alleged by [Muckey] in his subjective complaints."

(R. 17) The ALJ noted, "Both Dr. Pruitt and Dr. Boulden believe [Muckey] is capable of basic work activities, with some functional restrictions consistent with those found by DDS medical consultants." (R. 18) The ALJ found the opinions of the DDS consultants to be "entitled to heightened probative weight because they are consistent with and take into account [Muckey's] overall medical history and actual functional abilities." (*Id.*)

The ALJ determined Muckey retains the residual functional capacity to lift/carry twenty pounds occasionally and ten pounds frequently; stand, walk, and sit, with normal breaks, for six hours in an eight-hour workday; push/pull without limitation; and be limited to only occasional postural body movements. He found Muckey has the RFC "to engage in a range of competitive work at the light physical exertional level with the above-listed functional restrictions." (R. 18-19; R 20, ¶ 7)) He further found Muckey's past relevant work as a security guard, as that job is generally performed in the national economy, "did not require the performance of work-related activities precluded by his residual functional capacity." (R. 20, ¶ 8; R. 19)

Because Muckey retains the RFC to perform his past relevant work, the ALJ concluded he was not disabled at any time through June 30, 2002, his date last insured for purposes of DI benefits. (R. 20, ¶ 10)

III. DISABILITY DETERMINATIONS, THE BURDEN OF PROOF, AND THE SUBSTANTIAL EVIDENCE STANDARD

A. Disability Determinations and the Burden of Proof

Section 423(d) of the Social Security Act defines a disability as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months." 42 U.S.C.

§ 423(d)(1)(A); 20 C.F.R. § 404.1505. A claimant has a disability when the claimant is "not only unable to do his previous work but cannot, considering his age, education and work experience, engage in any other kind of substantial gainful work which exists . . . in significant numbers either in the region where such individual lives or in several regions of the country." 42 U.S.C. § 432(d)(2)(A).

To determine whether a claimant has a disability within the meaning of the Social Security Act, the Commissioner follows a five-step sequential evaluation process outlined in the regulations. 20 C.F.R. §§ 404.1520 & 416.920; *Dixon v. Barnhart*, 353 F.3d 602, 605 (8th Cir. 2003); *Kelley v. Callahan*, 133 F.3d 583, 587-88 (8th Cir. 1998) (citing *Ingram v. Chater*, 107 F.3d 598, 600 (8th Cir. 1997)). First, the Commissioner will consider a claimant's work activity. If the claimant is engaged in substantial gainful activity, then the claimant is not disabled. 20 C.F.R. § 404.1520(4)(i).

Second, if the claimant is not engaged in substantial gainful activity, the Commissioner looks to see "whether the claimant has a severe impairment that significantly limits the claimant's physical or mental ability to perform basic work activities." *Dixon*, 353 F.3d at 605; *accord Lewis v. Barnhart*, 353 F.3d 642, 645 (8th Cir. 2003). The United States Supreme Court has explained:

> The ability to do basic work activities is defined as "the abilities and aptitudes necessary to do most jobs." . . . Such abilities and aptitudes include "[p]hysical functions such as walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, or handling"; "[c]apacities for seeing, hearing, and speaking"; "[u]nderstanding, carrying out and remembering simple instructions"; "[u]se of judgment"; "[r]esponding appropriately to supervision, co-workers, and usual work situations"; and "[d]ealing with changes in a routine work setting."

Bowen v. Yuckert, 482 U.S. 137, 140-42, 107 S. Ct. 2287, 2291, 96 L. Ed. 2d 119 (1987) (citing 20 C.F.R. §§ 404.1521(b), 416.921(b)).

Third, if the claimant has a severe impairment, then the Commissioner will consider the medical severity of the impairment. If the impairment meets or equals one of the presumptively disabling impairments listed in the regulations, then the claimant is considered disabled, regardless of age, education, or work experience. 20 C.F.R. § 404.1520; *Kelley*, 133 F.3d at 588.

Fourth, if the claimant's impairment is severe, but it does not meet or equal one of the presumptively disabling impairments, then the Commissioner will assess the claimant's residual functional capacity ("RFC") to determine the claimant's "ability to meet the physical, mental, sensory, and other requirements" of the claimant's past relevant work. 20 C.F.R. §§ 404.1520(4)(iv); 404.1545(4); *see Lewis*, 353 F.3d at 645-46 ("RFC is a medical question defined wholly in terms of the claimant's physical ability to perform exertional tasks or, in other words, 'what the claimant can still do' despite his or her physical or mental limitations.") (citing *Bradshaw v. Heckler*, 810 F.2d 786, 790 (8th Cir. 1987); 20 C.F.R. § 404.1520(e) (1986)); *Dixon*, *supra*. The claimant is responsible for providing evidence the Commissioner will use to make a finding as to the claimant's RFC, but the Commissioner is responsible for developing the claimant's "complete medical history, including arranging for a consultative examination(s) if necessary, and making every reasonable effort to help [the claimant] get medical reports from [the claimant's] own medical sources." 20 C.F.R. § 404.1545(3). The Commissioner also will consider certain non-medical evidence and other evidence listed in the regulations. *See id.* If a claimant retains the RFC to perform past relevant work, then the claimant is not disabled. 20 C.F.R. § 404.1520(4)(iv).

Fifth, if the claimant's RFC as determined in step four will not allow the claimant to perform past relevant work, then the burden shifts to the Commissioner "to prove that there is other work that [the claimant] can do, given [the claimant's] RFC [as determined at step four], age, education, and work experience." Clarification of Rules Involving Residual Functional Capacity Assessments, etc., 68 Fed. Reg. 51,153, 51,155 (Aug. 26, 2003). The Commissioner must prove not only that the claimant's RFC will allow the claimant to make an adjustment to other work, but also that the other work exists in significant numbers in the national economy. *Id.*; 20 C.F.R. § 404.1520(4)(v); *Dixon, supra*; *Pearsall v. Massanari*, 274 F.3d 1211, 1217 (8th Cir. 2001) ("[I]f the claimant cannot perform the past work, the burden then shifts to the Commissioner to prove that there are other jobs in the national economy that the claimant can perform.") (citing *Cox v. Apfel*, 160 F.3d 1203, 1206 (8th Cir. 1998)); *Nevland v. Apfel*, 204 F.3d 853, 857 (8th Cir. 2000). If the claimant can make an adjustment to other work that exists in significant numbers in the national economy, then the Commissioner will find the claimant is not disabled. If the claimant cannot make an adjustment to other work, then the Commissioner will find the claimant is disabled. 20 C.F.R. § 404.1520(r)(v).

B. The Substantial Evidence Standard

The court reviews an ALJ's decision to determine whether the ALJ applied the correct legal standards, and whether the factual findings are supported by substantial evidence on the record as a whole. *Hensley v. Barnhart*, 352 F.3d 353, 355 (8th Cir. 2003); *Banks v. Massanari*, 258 F.3d 820, 823 (8th Cir. 2001) (citing *Lowe v. Apfel*, 226 F.3d 969, 971 (8th Cir. 2000)); *Berger v. Apfel*, 200 F.3d 1157, 1161 (8th Cir. 2000) (citing 42 U.S.C. § 405(g); *Richardson v. Perales*, 402 U.S. 389, 401, 91 S. Ct. 1420, 28 L. Ed. 2d 842 (1971)). This review is deferential; the court must affirm the ALJ's

factual findings if they are supported by substantial evidence on the record as a whole. *Id.* (citing *Estes v. Barnhart*, 275 F.3d 722, 724 (8th Cir. 2002); *Krogmeier v. Barnhart*, 294 F.3d 1019, 1022 (8th Cir. 2002) (citing *Prosch v. Apfel*, 201 F.3d 1010, 1012 (8th Cir. 2000)); *Kelley v. Callahan*, 133 F.3d 583, 587 (8th Cir. 1998) (citing *Matthews v. Bowen*, 879 F.2d 422, 423-24 (8th Cir. 1989)); 42 U.S.C. § 405(g) ("The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive. . . ."). Under this standard, "[s]ubstantial evidence is less than a preponderance but is enough that a reasonable mind would find it adequate to support the Commissioner's conclusion." *Krogmeier, id.*; *Weiler, id.*; *accord Gowell v. Apfel*, 242 F.3d 793, 796 (8th Cir. 2001) (citing *Craig v. Apfel*, 212 F.3d 433, 436 (8th Cir. 2000)); *Hutton v. Apfel*, 175 F.3d 651, 654 (8th Cir. 1999); *Woolf v. Shalala*, 3 F.3d 1210, 1213 (8th Cir. 1993).

Moreover, substantial evidence "on the record as a whole" requires consideration of the record in its entirety, taking into account both "evidence that detracts from the Commissioner's decision as well as evidence that supports it." *Krogmeier*, 294 F.3d at 1022 (citing *Craig*, 212 F.3d at 436); *Willcuts v. Apfel*, 143 F.3d 1134, 1136 (8th Cir. 1998) (quoting *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 488, 71 S. Ct. 456, 464, 95 L. Ed. 456 (1951)); *Gowell*, 242 F.3d at 796; *Hutton*, 175 F.3d at 654 (citing *Woolf*, 3 F.3d at 1213); *Kelley*, 133 F.3d at 587 (citing *Cline v. Sullivan*, 939 F.2d 560, 564 (8th Cir. 1991)). The court must "search the record for evidence contradicting the [Commissioner's] decision and give that evidence appropriate weight when determining whether the overall evidence in support is substantial." *Baldwin v. Barnhart*, 349 F.3d 549, 555 (8th Cir. 2003) (also citing *Cline*, *supra*).

In evaluating the evidence in an appeal of a denial of benefits, the court must apply a balancing test to assess any contradictory evidence. *Sobania v. Secretary of Health &*

Human Serv., 879 F.2d 441, 444 (8th Cir. 1989) (citing *Steadman v. S.E.C.*, 450 U.S. 91, 99, 101 S. Ct. 999, 1006, 67 L. Ed. 2d 69 (1981)). The court, however, does not "reweigh the evidence presented to the ALJ," *Baldwin*, 349 F.3d at 555 (citing *Bates v. Chater*, 54 F.3d 529, 532 (8th Cir. 1995)), or "review the factual record *de novo*." *Roe v. Chater*, 92 F.3d 672, 675 (8th Cir. 1996) (citing *Naber v. Shalala*, 22 F.3d 186, 188 (8th Cir. 1994)). Instead, if, after reviewing the evidence, the court finds it "possible to draw two inconsistent positions from the evidence and one of those positions represents the agency's findings, [the court] must affirm the [Commissioner's] decision." *Id.* (quoting *Robinson v. Sullivan*, 956 F.2d 836, 838 (8th Cir. 1992), and citing *Cruse v. Bowen*, 867 F.2d 1183, 1184 (8th Cir. 1989)); *accord Baldwin*, 349 F.3d at 555; *Young v. Apfel*, 221 F.3d 1065, 1068 (8th Cir. 2000). This is true even in cases where the court "might have weighed the evidence differently." *Culbertson v. Shalala*, 30 F.3d 934, 939 (8th Cir. 1994) (citing *Browning v. Sullivan*, 958 F.2d 817, 822 (8th Cir. 1992)); *accord Krogmeier,* 294 F.3d at 1022 (citing *Woolf*, 3 F.3d at 1213). The court may not reverse the Commissioner's decision "merely because substantial evidence would have supported an opposite decision." *Baldwin*, 349 F.3d at 555 (citing *Grebenick v. Chater*, 121 F.3d 1193, 1198 (8th Cir. 1997)); *Young*, 221 F.3d at 1068; *see Pearsall*, 274 F.3d at 1217; *Gowell*, 242 F.3d at 796; *Spradling v. Chater*, 126 F.3d 1072, 1074 (8th Cir. 1997).

On the issue of an ALJ's determination that a claimant's subjective complaints lack credibility, the Sixth and Seventh Circuits have held an ALJ's credibility determinations are entitled to considerable weight. *See, e.g., Young v. Secretary of H.H.S.,* 957 F.2d 386, 392 (7th Cir. 1992) (citing *Cheshier v. Bowen,* 831 F.2d 687, 690 (7th Cir. 1987)); *Gooch v. Secretary of H.H.S.,* 833 F.2d 589, 592 (6th Cir. 1987), *cert. denied*, 484 U.S. 1075, 108 S. Ct. 1050, 98 L. Ed. 2d. 1012 (1988); *Hardaway v. Secretary of H.H.S.,* 823 F.2d 922, 928 (6th Cir. 1987). Nonetheless, in the Eighth Circuit, an ALJ may not

discredit a claimant's subjective allegations of pain, discomfort or other disabling limitations simply because there is a lack of objective evidence; instead, the ALJ may only discredit subjective complaints if they are inconsistent with the record as a whole. *See Hinchey v. Shalala,* 29 F.3d 428, 432 (8th Cir. 1994); *see also Bishop v. Sullivan,* 900 F.2d 1259, 1262 (8th Cir. 1990) (citing *Polaski v. Heckler,* 739 F.2d 1320, 1322 (8th Cir. 1984)). As the court explained in *Polaski v. Heckler:*

> The adjudicator must give full consideration to all of the evidence presented relating to subjective complaints, including the claimant's prior work record, and observations by third parties and treating and examining physicians relating to such matters as:
>
> 1) the claimant's daily activities;
> 2) the duration, frequency and intensity of the pain;
> 3) precipitating and aggravating factors;
> 4) dosage, effectiveness and side effects of medication;
> 5) functional restrictions.

Polaski, 739 F.2d 1320, 1322 (8th Cir. 1984). *Accord Ramirez v. Barnhart*, 292 F.3d 576, 580-81 (8th Cir. 2002).

IV. ANALYSIS

Preliminarily, the court takes issue with two discrete findings by the ALJ. First, the court notes that in reaching a determination that Muckey's subjective allegations were not credible, the ALJ relied, *inter alia*, on Dr. Hoversten's description of the videotape that allegedly shows Muckey doing yard work with a normal gait and ease of movement. (*Id.*) The ALJ failed to cite his reasons for disbelieving Muckey's testimony that the videotape actually showed his brother performing these activities. Muckey's testimony in

that regard is not contradicted by anything in the record, and the court credits Muckey's testimony that the videotape shows his brother doing the yard work, rather than Muckey.

Second, the ALJ recognized that the Physical Residual Functional Capacity Assessment form (R. 124-31) submitted along with the written comments of Gary J. Cromer, M.D. (R. 132) bears a different claimant's name than Muckey's, while the written comments address Muckey's condition. The ALJ found that because Muckey's attorney did not object to the exhibit, "and because it appears consistent with the medical evidence as a whole," the exhibit was credible, and the ALJ gave heightened weight to the written comments at R. 132. (R. 18) Without testimony or an affidavit from Dr. Cromer to indicate the name on the RFC assessment was not in error, and that the assessment actually relates to Muckey, the court finds it was error for the ALJ to credit the RFC assessment. Dr. Cromer undoubtedly performs numerous RFC assessments in the course of his practice, and it would appear the wrong assessment was attached to his comments regarding Muckey. On the other hand, the ALJ did not err in including Dr. Cromer's written comments in his evaluation of Muckey's claim, as those comments expressly relate to Muckey.

Despite these errors in the ALJ's opinion, the ALJ still may have reached an appropriate conclusion that is supported by substantial evidence in the record. Muckey was working eight hours a day at a temporary job at the time of the hearing. (*See* R. 274-75) The Commissioner notes that any work performed during any period in which a claimant believes he is disabled may show an ability to work at the substantial gainful activities level. (Doc. No. 8, p. 10, citing 20 C.F.R. § 404.1571) "Individuals are ineligible to receive social security disability benefits if they are engaged in 'substantial gainful activity.'" *United States v. Goodson*, 155 F.3d 963, 965 (8th Cir. 1998) (citing 20 C.F.R. § 404.1571). This is true "regardless of the claimant's age, education, prior

work activity and even if the claimant is in fact physically or mentally impaired." *Cooper v. Sec'y of H.H.S.*, 919 F.2d 1317, 1318 (8th Cir. 1990) (citing *Thompson v. Sullivan*, 878 F.2d 1108, 1110 (8th Cir. 1989); *Burkhalter v. Schweiker*, 711 F.2d 841, 843 (8th Cir. 1983); 10 C.F.R. § 404.1520(b)). To determine whether a claimant's work constitutes substantial gainful activity, the Commissioner considers the "amount of pay, length of time worked, and whether the work was conducted in a special work area or with special assistance." *Thompson v. Sullivan*, 878 F.2d 1108, 1110 (8th Cir. 1989).

In this case, the ALJ considered the brief duration of Muckey's security guard job at the grain elevator in finding he had not engaged in substantial gainful activity since his alleged onset date of June 10, 1999. (*See* R. 12)

However, Muckey also testified he had no trouble performing his duties at that job, and he could continue to do similar work on a full-time basis if a job were available. (R. 294) The ALJ found Muckey's opinion regarding his ability to work to be persuasive, and the court tends to agree. Muckey testified he had never missed a night of work at the job. (R. 294). His duties included walking out to the dryer once per hour to get some corn to be tested for moisture content. (R. 274) He previously had worked as a security guard, but the job included some physical, heavy duties unrelated to the security portion of the job. Muckey stated he could still perform the security duties, such as watching the gate. (R. 295)

The VE considered Muckey's testimony regarding his limitations in responding to the ALJ's first hypothetical question. The VE noted that if Muckey were limited to standing for about ten minutes at a time, and sitting for periods of twenty to thirty minutes at a time, he could perform the duties of a security guard, as well as the work of an assembler of small products, an inspector and hand packager, and a laundry folder. (R. 310-11) The ALJ accepted the VE's opinion in reaching his decision. (R. 19)

In addition, as the ALJ noted, Dr. Pruitt opined Muckey should be able to work, with appropriate limitations. In December 1999, Dr. Pruitt stated Muckey could return to work, beginning with four hours per day, and he could carry up to ten pounds frequently, and thirty pounds occasionally; alternate sitting and standing as necessary; only work with his left hand; and use a crutch for stability. (R. 239) The lifting restrictions found by the ALJ were lower than those suggested by Dr. Pruitt. In addition, by the time of the hearing, Muckey was no longer relying on a crutch, but was ambulating satisfactorily using a single-point cane.

Viewing the record as a whole, the court finds no substantial evidence in the record to undermine the ALJ's conclusion that Muckey is able to work. Clearly, Muckey experiences some pain and discomfort on a daily basis. However, substantial evidence in the record indicates he nevertheless retains the capacity to perform work at the light or sedentary physical exertional level, and he therefore is not disabled.

V. CONCLUSION

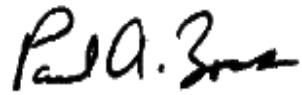
For the reasons discussed above, **IT IS RESPECTFULLY RECOMMENDED**, unless any party files objections[4] to the Report and Recommendation in accordance with 28 U.S.C. § 636 (b)(1)(C) and Fed. R. Civ. P. 72(b), within ten (10) days of the service

[4]Objections must specify the parts of the report and recommendation to which objections are made. Objections must specify the parts of the record, including exhibits and transcript lines, which form the basis for such objections. *See* Fed. R. Civ. P. 72. Failure to file timely objections may result in waiver of the right to appeal questions of fact. *See Thomas v. Arn*, 474 U.S. 140, 155, 106 S. Ct. 466, 475, 88 L. Ed. 2d 435 (1985); *Thompson v. Nix*, 897 F.2d 356 (8th Cir. 1990).

of a copy of this Report and Recommendation, that the Commissioner's decision be affirmed, and judgment be entered for the Commissioner and against Muckey.[5]

IT IS SO ORDERED.

DATED this 2nd day of August, 2004.



PAUL A. ZOSS
MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT

[5]NOTE: If the district court overrules this recommendation and final judgment is entered for the plaintiff, the plaintiff's counsel must comply with the requirements of Local Rule 54.2(b) in connection with any application for attorney fees.